IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Criminal Revision Case No.1448 of 2007
and M.P.Nos.1 and 2 of 2007

V.R.Eswaramoorthy ... Petitioner

-Vs.-

1. Suriya Chakra Spinning Mills Pvt. Ltd.,
by its Managing Director, M.Loganathan
82 Kothukarar Street, Veerappan Chatiram
Erode

2. M.Loganathan

3. L.Latha ... Respondents

Prayer : Criminal Revision case filed under Sections 397 and 401 of the Criminal Procedure Code against the order dated 10.09.2007 made in C.M.P.No.1384 of 2007 in C.C.No.602 of 2006 on the file of the learned Judicial Magistrate No.I, Erode.

For Petitioner : Mr. N.Manokaran
For Respondents : Mr. S.Jayakumar

O R D E R

The complainant in C.C.No.602 of 2006 on the file of the Judicial Magistrate No.I, Erode, is the petitioner in the above criminal revision case. On the basis of the complaint filed by the petitioner against the respondents herein, the learned Magistrate has taken the complaint on file for an offence punishable under Section 138 of the Negotiable Instruments Act in C.C.No.602 of 2006. The cheque in question is alleged to have been returned/ unpaid with an endorsement "Account transferred to suit filed account". After completion of trial and hearing of arguments was over and when the judgment has been reserved, the petitioner filed a petition in C.M.P.No.1384 of 2007 under Section 216 of the Criminal Procedure Code (in short "Cr.P.C.")praying to alter / add a charge under Section 420 Indian Penal Code (in short "IPC") against the respondents herein on the basis of the contentions raised in the written arguments submitted by the learned counsel

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for the respondents. The respondents herein raised objections for entertaining the said petition contending that there is absolutely no material on record to alter / add the charge for an offence under Section 420 IPC and merely on the basis of legal contentions put forth in the written arguments a new charge cannot be framed. The learned Magistrate after considering the materials on record dismissed the said petition and being aggrieved by that the complainant is before this Court in the above revision.

2. Heard both sides.

3. Mr. N.Manoharan learned counsel for the petitioner submitted that the cheque in question was returned with an endorsement "Account transferred to suit filed account" on 05.04.2004 and it shows that on the date of issuing the cheque the respondents had no account in the bank and therefore they deceitfully issued the cheque to cheat the complainant and hence an offence under Section 420 IPC is made out in the light of the materials available on record. He further submitted that the provisions contained in Section 216 of the Cr.P.C gives wide power to the Court to alter or add any charge at any time before the judgment is pronounced and the written arguments filed by the accused would amply prove the commission of the offence under Section 420 IPC and therefore the order of the learned Magistrate is liable to be set-aside.

4. (i) In support of his above contentions the learned counsel for the petitioner relied upon the decision of the Apex Court reported in (2004) 5 Supreme Court Cases 347 (Hasanbhai Valibhai Qureshi v. State of Gujarat), wherein in paragraph 10 it is observed as follows:-

> "10. Therefore, if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

(ii) Learned counsel for the petitioner also relied on a Full Bench decision of the Andhra Pradesh High Court reported in 2001 CRI. L.J. 1489 (M/s. OPTS Marketing Pvt. Ltd. v. State of A.P.) (FB), wherein in paragraph 29 (ii) it is observed as follows:-

> 29 (ii) Even after introduction of S. 138 of the Negotiable Instruments Act, prosecution under S. 420, IPC is maintainable in case of dishonour of cheques or postdated cheques issued towards payment of price of the goods purchased or hand loan taken, or in discharge of an antecedent debt or towards payment of goods supplier earlier, if the charge-sheet contains an allegation that the

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accused had dishonest intention not to pay even at the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation. Private complaint or FIR alleging offence under S. 420, IPC for dishonour of cheques or postdated cheques cannot be quashed under S. 482, Cr.P.C., if the averments in the complaint show that the accused had, with a dishonest intention and to cause damage to his mind, body or reputation, issued the cheque which was not honoured".

(iii) Learned counsel for the petitioner also relied upon a decision of the learned Judge of this Court reported in 2007-2-L.W. (Cri.) 880 (N.Anbarasu v. M.Ganesan), wherein in paragraphs 6 and 7 it is observed as follows:-

"6. Under Section 216 Cr.P.C, the Court may alter or add any charge at any time before the judgment is pronounced. After alteration or addition of the charge, the learned Magistrate may proceed with the trial, as if the altered or added charge had been the original charge. The trial Court may have to take care of the accused, so that prejudice should not be caused to him and thereby all opportunities must be given to him.

7. In such circumstances, during the course of trial of a summons case, when new materials came into existence through the evidence, the complainant is entitled to invoke the provisions of Section 216 Cr.P.C."

5. Countering the submissions made by the learned counsel for the petitioner, Mr. S.Jayaraman, learned counsel for the respondents submitted that the petition under Section 216 Cr.P.C was filed by the revision petitioner after the examination of all the witnesses were completed, after filing of the written arguments under Section 314 Cr.P.C, and when the case was posted for delivering judgment. Learned counsel for the respondents further submitted that earlier the petitioner filed Crl.R.C.No.622 of 2007 and obtained stay of further proceedings in the case and ultimately by an order dated 17.04.2007 the criminal revision case was disposed of with a direction to complete the trial within a period of two weeks from the date of receipt of a copy of the order passed in the said revision; again the petitioner filed Crl.O.P.No.11976 of 2007 seeking transfer of the case to some other court and obtained stay and ultimately the said criminal original petition was disposed of by an order dated 27.04.2007; thereafter, the said CMP has been filed under Section 216 Cr.P.C with an intention to further delay the proceedings and to harass the respondents herein. Learned counsel further submitted that a new charge can be added or altered only if there is material in the evidence and because there were no allegations in the complaint and there was no material in

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the evidence to prima facie establish a charge under Section 420 IPC the court below has rightly dismissed the petition filed by the complainant. Learned counsel further submitted that the legal contention raised in the written arguments that the endorsement "Account transferred to suit filed account" will amount to closure of account cannot be the basis for altering the charge; the submissions contained in the written arguments cannot be considered to be evidence on record and therefore the learned counsel contended that the order passed by the Court below does not call for any interference. In support of the above said contentions, the learned counsel for the respondents relied upon the following decisions:-

(i) 1999-2-L.W.(Cri.) 807 (A.Balasubramaniam v. State, etc.).
(ii) 1989 CRI. L.J. 255 (Rajendra Singh v. State)
(iii) 2002 CRI. L.J. 1670 (T.J.Edward v. C.A.Victor Immanuel)
(iv) (2006) 2 M.L.J. (Crl.) 173 (Lak Ram v. Nihal Singh)
(v) 2004 CRI. L.J. 920 (State of Maharashtra v. Salman Salim Khan).

(I) In 1999-2-L.W. (Cri.) 807 (referred to supra) in paragraphs 9 and 10 it is observed as follows:-

> "9. Section 3 of the Evidence Act, while defining the word "evidence", would provide that the statements made before the Court by the witnesses and documents produced for the inspection of the Court are called oral evidence and documentary evidence respectively.
> 10. Admittedly, in the instant case, the evidence has not been adduced before the trial Court. 'Evidence' means, the evidence recorded during the course of enquiry or trial by the Court and not the statements at the stage of investigation recorded by the police. In other words, unless there is evidence recorded by the Court, Section 319 Cr.P.C. cannot be invoked".

(II) In 1989 CRI. L.J. 255 (referred to supra) in paragraph 6 it is observed as follows:-

> "6. .... This power to add to or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or the non-framing of a charge and whether they are discovered at the inception of the trial or at subsequent stage of the trial, prior to pronouncement of judgment State v. Naijnath, AIR 1953 All 191 : (1953 Cri LJ 478). This power to add to or alter a charge cannot, however, be exercised unless there are evidences on record to support the addition or alteration of charge ...."

(III) In 2002 CRI. L.J. 1670 (referred to supra) it is observed as follows:-

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"..... The legal position is also that a new charge can be added only if there are material before Court either in the complaint or in the evidence to justify such action. For justifying alteration of charge also there should be material either in the complaint or in the evidence. The learned Sessions Judge held that the question of altering charge arises only when the charge is framed and as the offence alleged to be committed is punishable under S. 138 of the Act (offence is triable as a summons case) no charge need be framed (only particulars of the offence of which revision petitioner is accused need be stated to him) and therefore, no question of framing additional charge as prayed for by the revision petitioner. Even treating the application moved by revision petitioner as one filed under S. 216 Cr.P.C. to frame a new charge under S. 420, IPC there is no material either in the complaint or in evidence to frame such a charge. It may also be pointed out here that application for alteration of the charge should be made immediately after the charge been read out and explained by Magistrate (See Sohoni's Code of Criminal Procedure, 1973, 19th Edn., Vol.3, page 2514). As there is no material to hold that a prima facie case against the respondent exists to frame charge against him for commission of offence punishable under S. 420, IPC, no charge can be framed against the respondent under S. 420, IPC."

(IV) In (2006) 2 M.L.J. (Crl.) 173 (referred to supra) in paragraphs 7 and 8 the Apex Court has observed as follows:-

"7. ... The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. ....

8. .... The word "evidence" in Section 319 contemplates that evidence of witnesses given in the Court ....."

(V) In 2004 CRI. L.J. 920 (referred to supra) in paragraph 13 the Apex Court has observed as follows:-

"Therefore, we think it appropriate that the findings in regard to the sufficiency or otherwise of the material to frame a charge punishable under Section 304 Part II IPC of both the courts below should be set aside and it should be left to be decided by the court trying the offence to alter

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or modify any such charge at an appropriate stage based on material produced by way of evidence."

6. I have carefully considered the submissions made by the learned counsel on either side. A close reading of the decisions relied upon by the learned counsel on either side makes it abundantly clear that the law governing the trial on criminal offence provides for alteration of charges at any stage of the proceedings depending upon the evidence adduced in the case. As observed by the Apex Court the word "evidence" in Section 319 Cr.P.C. contemplates "evidence of witnesses given in the Court". The trial court can alter or add a charge only on the basis of evidence adduced before it and not on the basis of any other material which do not constitute evidence. If there is any material either in the complaint or in the evidence adduced during the course of trial, it is open to the trial court to frame a new charge. As per Section 3 of the Evidence Act the word "evidence" would mean the statements made before the Court by the witnesses and documents produced for the inspection of the Court and they are called oral evidence and documentary evidence respectively.

7. In the light of the above said principles culled out from the various decisions cited supra it has to be considered as to whether any evidence was made available in the course of trial which warranted the addition of a charge under Section 420 IPC in this case. Learned counsel for the petitioner fairly submitted that except the contentions put forth in the written arguments filed by the learned counsel for the respondents under Section 314 Cr.P.C, there is no other material, which warrants the addition of a charge under Section 420 IPC. In the written arguments it is contended that since the cheque in question was returned with the endorsement "Account transferred to suit filed account" it should be construed that on the date when the cheque was returned by the bank, the accused did not have an account in the bank. The above said contention is a legal contention put forth by the learned counsel for the accused and such a legal contention cannot be considered as "evidence". Therefore, on the basis of the above said legal contention a new charge under Section 420 IPC could not be added.

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8. As rightly contended by the learned counsel for the respondents, earlier on two occasions the petitioner had approached this Court and obtained stay and that has caused delay in the disposal of the case. This Court, while disposing of Crl.R.C.No.622 of 2007 has directed the trial court to complete the trial within a period of two weeks from the date of receipt of a copy of that order and thereafter the petitioner filed Crl.O.P.No.11976 of 2007 for transfer which was ultimately disposed of on 27.04.2007. When the examination of the witnesses was closed, oral arguments heard and written arguments have also been filed and the case was reserved for judgment, the present petition

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under Section 216 Cr.P.C. has been filed. As rightly pointed out by the trial court this is only an attempt on the part of the complainant to further drag on the proceedings.

9. The decision reported in 2007-2-L.W. (Cri.) 880 (referred to supra) is not applicable to the facts of this case because in that case as new facts have been revealed through the evidence of P.W.2 the complainant filed a petition under Section 216 Cr.P.C. to include 420 IPC in the case to proceed against the accused and only in such circumstances the trial court altered the charge and when such alteration of charge was challenged, the challenge was rejected on the ground that as new materials came into existence through the evidence the complainant is entitled to invoke the provisions contained in Section 216 Cr.P.C. But as pointed out above in the case on hand there is no material either in the complaint or in the evidence to frame a new charge under Section 420 IPC. Therefore, this Court is of the considered view that there is no irregularity or illegality in the order passed by the Court below and as such this Court is not inclined to interfere with the order of the lower Court and accordingly the above criminal revision case fails and the same is dismissed. Consequently, the connected MPs are closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

srk

To

1. Judicial Magistrate No.I, Erode.

2. Do thro the Chief Judicial Magistrate, Erode.

2 ccs to Mr.S. Jayakumar, Advocate, Sr. 65261
1 cc to Mr.N. Manokaran, Advocate, Sr. 65530
2 ccs to Mr.S. Jayakumar, Advocate, Sr. 64095

Crl. R.C.No.1448 of 2007 and
M.P.Nos.1 and 2 of 2007

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